82-6262

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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ROBERT LEWIS WALLACE,

Petitioner,

-v-

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the Trial Court's instructions to the jury created a presumption of intent to kill, thereby unconstitutionally relieving the State of its burden of proving an essential element of murder and depriving Petitioner of due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Whether trial counsel's failure to present readily available mitigating evidence about Petitioner's mental illness, family and personal background and mitigating testimony from the victim's father, denied Petitioner's right to effective assistance of counsel in violation of Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the trial court's refusal to allow a witness to testify to her opinion on whether or not Petitioner should be sentenced to death prevented the jury from considering mitigating evidence, thereby violating Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments?

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner Robert Lewis Wallace respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia deciding Petitioner's appeal from trial is reported at 248 Ga. 255, 282 S.E. 2d 325 (1981), and is attached hereto as Appendix A. The unreported opinion from the Superior Court of Butts County denying Petitioner's Petition for Writ of Habeas Corpus is attached hereto as Appendix B. The unreported Order of the Supreme Court of Georgia denying Petitioner's Application to the Supreme Court of Georgia for Certificate of Probable Cause, is attached hereto as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 22, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence"

the Eighth Amendment, which provides in relevant part:

> "[N]or cruel and unusual punishments inflicted "

and the Fourteenth Amendment, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

The Trial

Petitioner Robert Lewis Wallace was indicted by the Greene County, Georgia grand jury, July Term, 1979, on charges of murder, aggravated assault, motor vehicle theft and driving under the influence.[1/] Despite the timely withdrawal of the motion for change of venue, the Superior Court of Greene County granted said motion which had been filed by counsel for Petitioner on August 3, 1979. A special plea of incompetency to stand trial was filed by Petitioner and on February 12, 1980, the Superior Court of

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1/ References to the official record of Petitioner's case shall be indicated by the letter "R." followed by the page on which the reference may be found. References to the transcript of Petitioner's trial shall be indicated by the letter "T." followed by the page on which the reference may be found.

Greene County, sitting in Baldwin County found Petitioner competent to stand trial. (R. 132). The trial on the issue of Petitioner's guilt or innocence commenced the following day. At the onset of the trial, counsel for Petitioner maintained that they could not adequately represent Petitioner because of his inability to communicate. (T. 10). Counsel informed the trial court that they were inadequately prepared for trial and would render ineffective assistance of counsel because they were not prepared (T. 37). Counsel's motion for continuance until counsel could prepare for trial was denied. Counsel then moved to withdraw as counsel, which was also denied. (T. 23-37).

During the trial on the issue of Petitioner's guilt or innocence, Petitioner attempted to introduce evidence showing that any acts committed by him were done without malice aforethought. (T. 386). The testimony profferred was that Petitioner was suffering from a severe mental disease and that his acts were motivated by a mental state other than maliciousness. (T. 384-401).

Petitioner's written request to the trial court to charge the jury on voluntary manslaughter was denied. Instead, the jury was charged as follows:

> Murder. A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away a life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. [emphasis added].

> Now, ladies and gentlemen of the Jury, I charge you that malice is an essential ingredient in the offense of murder and it must exist before any homicide can be murder. But malice in its legal sense is not necessarily ill-will or hatred. It is the unlawful intention to kill a human being without excuse, justification, or mitigation. It is not necessary, however, that this unlawful deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer before a moment before he fires the fatal shot, that is sufficient.
>
> Now, ladies and gentlemen, I charge you that a crime is a violation of the Statute of this State in which there shall be a union or joint operation of act and intention. I charge you that a person will not be presumed to act with criminal intention but the trier of the facts, and is you, the Jury, may find such intention upon consideration of words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. A specific intent to commit the crime charged in this indictment and each count thereof is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the Jury and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways provided the Jury finds that it existed from the evidence produced before them. It may be inferred from the proven circumstances or by acts and conduct or it may be presumed when it is the natural and necessary consequences of the act.
>
> I further charge you that intent to commit the crime charged in this indictment is an essential element the State must prove beyond a reasonable doubt. Intent is always a question for the Jury and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways provided the Jury finds that it existed from the evidence before them. It may be inferred from the proven circumstances or by acts or conduct and it may be presumed when it is the natural and necessary consequences of the act. [emphasis added] (T. 458-459).

During the penalty phase of Petitioner's trial on the merits, counsel for Petitioner called three witnesses to testify on behalf of Petitioner: family minister Reverend General Lee Avery, Petitioner's first grade teacher Doreatha

Jenkins and Petitioner's father, Roger Wallace. (T. 478-514). Counsel did not present any psychiatric evidence in mitigation of Petitioner's mental state, as had been testified to by psychiatrists at the separate trial on Petitioner's competence; Counsel did not call as a witness victim Thomas Rowry's father, who had told the defense team that he did not want Petitioner to be sentenced to death; counsel failed to present evidence that Petitioner had no prior convictions; and counsel presented no evidence of Petitioner's difficult family history as a mitigating circumstance.

During the penalty phase, Doreatha Jenkins attempted to testify that, in her opinion, Petitioner should not be sentenced to death. The trial court prevented Ms. Jenkins from so testifying. (T. 503).

The Habeas Corpus Hearing

At the hearing held on May 13, 1982, on the Petition for Writ of Habeas Corpus, lead trial counsel Edward Augustine testified that he did no preparation for the penalty phase. (H. 89-91).[2/] He stated to the court that he had been sure that Petitioner would be found incompetent to stand trial. Augustine testified that because of his confidence in prevailing at the competency trial he never expected to go to the trial on the merits of the case, and therefore, had not even considered preparing for the penalty phase. Id.

2/ Each reference to the transcript of Petitioner's habeas corpus hearing in the Superior Court of Butts County will be indicated by the letter "H.", followed by the page on which the reference may be found. Each reference to Petitioner's exhibits admitted into evidence at the habeas corpus hearing will be referred to as "Pet. Ex." followed by the exhibit number.

This is corroborated in an affidavit prepared by Augustine and in affidavits and testimony of attorneys Katrina Breeding and August Siemon who assisted at trial and the pretrial preparation. (Pet. Ex. 1, 2, 3, H. 123-24, 138-39). Further corroboration is provided by the testimony of Reverend Avery, who also assisted in pretrial investigation. (H. 21-22). In her testimony, Breeding described the atmosphere at the penalty phase as "mass confusion." (H. 136). This account is further brought to life by Reverend Avery's testimony that Augustine asked him during the trial on the merits for ideas of possible witnesses for the penalty phase. (H. 22-24, 36-37). Reverend Avery suggested that Petitioner's elementary school teacher, Doreatha Jenkins, might be a witness; Reverend Avery telephoned Ms. Jenkins in Washington, Georgia to ask her to testify on the same day she took the witness stand. (H. 22-24).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. During Petitioner's trial on his guilt or innocence, counsel attempted to present evidence that any acts committed by Petitioner were done without malice. (T. 384-401). Psychiatric testimony was profferred that Petitioner was suffering from a severe mental disease and that his acts were motivated by a mental state other than maliciousness. Said testimony was excluded by the trial court as being irrelevant. (T. 400-401).

In his Consolidated Amended Motion for New Trial filed November 26, 1980, Petitioner raised as errors the trial court's failure to charge on voluntary manslaughter, the trial court's charge on malice, and the exclusion of the evidence offered by Petitioner on the issue of malice. (R. 170-74).

On direct appeal to the Supreme Court of Georgia, the failure of the trial court to charge the jury on voluntary manslaughter and the trial court's charge on malice were alleged as Petitioner's tenth and eleventh enumerations of error, as denying Petitioner's rights to due process of law and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments. (Brief of Appellant at 6). The trial court's exclusion of the psychiatric evidence proffered by Petitioner on the issue of malice was alleged in Petitioner's twelfth enumeration of error as violating petitioner's rights to due process of law and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Petitioner's

claims were rejected by the Supreme Court of Georgia. (Wallace v. State, 248 Ga. 255, 261-63; 282 S.E. 2d 325, 332-33 (1981), Attached hereto as Exhibit A). Regarding the trial court's refusal to charge on voluntary manslaughter, the Georgia Supreme Court stated, "The trial court did not err in failing, upon written request, to charge on voluntary manslaughter as there was no factual basis for such a charge." 248 Ga. at 261-62, 282 S.E. 2d 332-33. As to the trial court's charge on malice and exclusion of psychiatric evidence, the Georgia Supreme Court stated that the "argument that such a charge [on malice] is burden shifting or creates an impermissible inference has been raised before and decided to the contrary," and that "the trial court properly excluded the evidence as irrelevant to guilt-innocence. Mental abnormality, unless it amounts to insanity, is not a defense to a crime." 248 Ga. at 262; 282 S.E. 2d 332-33. Further, with regard to the trial court's charge on malice, the Georgia Supreme Court stated that:

> From the charge read as a whole, the jury only could have understood that appellant could not be convicted unless the State proved criminal intent beyond a reasonable doubt and that for the State to prove intent, the State must prove beyond a reasonable doubt that the requisite criminal intent was the natural and necessary consequence of proven acts. 248 Ga. at 263.

Petitioner also raised these constitutional claims in his Petition for Writ of Habeas Corpus and in his Memorandum of Law in Support thereof, following the hearing on the Petition in the Superior Court of Butts County. The Court denied the claims, based on the Georgia Supreme Court's prior

rejection of the claims on direct appeal. (Order of Superior Court of Butts County at p. 13, Attached hereto as Appendix B).

Petitioner raised the above issues in his Application to the Supreme Court of Georgia for Certificate of Probable Cause, following denial of the Petition for Writ of Habeas Corpus. The Application was denied. (Denial of Application for Certificate of Probable Cause, Attached hereto as Appendix C).

2. In his Petition for Writ of Habeas Corpus and in his Memorandum of Law in Support of the Writ of Habeas Corpus, Petitioner alleged that he was denied his right to effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments by trial counsel's failure to present readily available mitigating evidence concerning Petitioner's background and circumstances of the case. Petitioner presented evidence in support of these claims at the habeas corpus hearing held in the Superior Court of Butts County, Georgia. All claims of ineffective assistance of counsel were denied by the Superior Court. (Appendix B). The Superior Court found that trial counsel "easily meet the test" of reasonably effective assistance of counsel. Superior Court Order at p. 7. The court stated that trial counsel "prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of material with which to work." Id. Further, the Superior Court found that Petitioner "has made no showing of any harm or prejudice." Id. at p. 8. The Supreme Court of Georgia denied Petitioner's Application for Writ

of Probable Cause to Appeal from the Superior Court's Order (Appendix C).

3. During the penalty phase of trial, the trial court excluded evidence of witness Doreatha Jenkin's opinion as to whether Petitioner should be sentenced to death. (T. 503). On direct appeal to the Supreme Court of Georgia, the trial court's ruling was alleged in Petitioner's thirteenth enumeration of error, as denying Petitioner's rights to due process of law and freedom from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments. (Brief of Appellant at 7). The Georgia Supreme Court rejected Petitioner's claims. 248 Ga. at 263; 282 S.E. 2d at 333. The Georgia Supreme Court stated, "The witness was allowed to testify as to the facts and circumstances of the appellant's life that were of a mitigating nature and the trial court did not err in excluding the personal opinion of the witness as to whether the death penalty should be imposed." 248 Ga. at 263; 282 S.E. 2d at 333. In his Petition for Writ of Habeas Corpus and Memorandum of Law in Support thereof, Petitioner again raised these constitutional grounds in challenging the court's exclusion of the opinion evidence. These claims were again rejected by the Superior Court of Butts County, Georgia, on the ground that the issue had been decided on direct appeal to the Georgia Supreme Court (Appendix B, Superior Court Order, at pp. 13-14). Petitioner's Application for a Certificate of Probable Cause to Appeal from the Superior Court's Order was denied. (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY CREATED A PRESUMPTION OF INTENT TO KILL, THEREBY UNCONSTITUTIONALLY RELIEVING THE STATE OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF MURDER AND DEPRIVING PETITIONER OF DUE PROCESS OF LAW.

Under the Due Process clause of the Fourteenth Amendment, the State must prove the existence of every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Petitioner was tried for murder, which consists of the following elements: (1) unlawfully (2) causing the death of another human being (3) with malice aforethought. Holloway v. McElroy, 474 F. Supp. 1363, 1368 (M.D. Ga. 1979). Malice is defined as a "deliberate intention" to kill; since deliberate intention to kill is an essential part of malice, which is an essential element of murder, intent to kill is an essential element of the crime of murder. Mason v. Balkcom, 669 F.2d 222 (11thCir. 1982). Therefore, the State had the burden to prove beyond a reasonable doubt that Petitioner had the requisite intent to kill.

Since this Court decided In re Winship, considerable ambiguity has arisen regarding the criteria employed to determine what the State's case is, the scope of the reasonable doubt standard, and the constitutional status of standard instructions on inferences and presumptions. The facts of this case present in bold relief an important opportunity to address these issues.

The Supreme Court in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979), addressed the above-mentioned issues. In question was the Montana law of "deliberate homicide," which was defined as "purposely or knowingly" causing the death of another human being. 194 Mont. Rev. Codes §§ 94-5-101, 102 (Crim. Code 1973). The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was held unconstitutional by the Supreme Court because it relieved the State of the burden of proof on the critical question of Petitioner's state of mind. 442 U.S. at 521, 99 S.Ct. at 2458; In re Winship, supra. The Court in Sandstrom identified two types of presumptions from the possible interpretations of the trial court's instructions: conclusive presumptions and presumptions which have the effect of shifting the burden of proof on a required element of the offense. 442 U.S. at 517-21, 99 S.Ct. at 2456-58. Both are constitutionally deficient.

In Mason v. Balkcom, the Eleventh Circuit tested instructions which were also given by the trial court in Petitioner's case:

> Murder. A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away a life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart.

(T. 458); 669 F.2d at 226. The Court of Appeals held that the challenged instructions unconstitutionally relieved the State of its burden of proving every element of the crime of murder beyond a reasonable doubt.

In the instant case, nowhere in the court's charge was the jury apprised of what quantum of proof, if any, would be required to rebut the presumptions charged. Additionally, the court excluded Petitioner's testimony on his mental state, offered to rebut the presumption of malice. (T. 400-401). The combined effect of the exclusion of evidence on Petitioner's mental state and the trial court's charge was to deprive Petitioner of his Due Process rights to present relevant evidence in his defense and to be free from conviction except where the State has proven each of the required elements of a crime beyond a reasonable doubt. It is in order to resolve this significant constitutional issue that Petitioner respectfully seeks certiorari from this Court.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TRIAL COUNSEL'S FAILURE TO PRESENT READILY AVAILABLE MITIGATING EVIDENCE ABOUT PETITIONER'S MENTAL ILLNESS, FAMILY AND PERSONAL BACKGROUND, AND MITIGATING TESTIMONY FROM THE VICTIM'S FATHER, DENIED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner asserts that the ineffective assistance of trial counsel in this case resulted in a sentencing hearing which failed to follow the mandate of this Court for "a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). For in the instant case, trial counsel failed to present to the jury crucial and readily available mitigating evidence of Petitioner's diagnosed psychosis and difficult childhood. Trial counsel also failed to present to the jury equally mitigating and readily available evidence that Petitioner had no prior criminal record, as well as testimony by the victim's father, Thomas Rowry, that he did not want Petitioner to be sentenced to death.

This Court has recognized that the Sixth Amendment right to counsel is satisfied only when an accused is provided effective counsel, for "[u]nless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. 335, 343

(1980), citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963). In capital cases, the requirement for increased reliability in sentencing should result in heightened scrutiny of defense counsel's services. Lockett v. Ohio, supra.

Petitioner was represented at the hearing concerning his competency to stand trial and at the guilt-innocence and sentencing phases by Edward E. Augustine, assisted by attorneys Katrina L. Breeding and August F. Siemon. Mr. Augustine's services had been retained by Petitioner's family for $10,000 plus expenses which amounted to more than $1000. (H. 78,108). As the distinction between standards applied to retained and appointed counsel have been eliminated, Petitioner's counsel is subject to the high standard of strict scrutiny called for in capital cases. See, Cuyler v. Sullivan, supra.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court reversed the death sentence "[b]ecause this sentence was imposed without 'the type of individualized consideration of mitigating factors...required by the Eighth and Fourteenth Amendments in capital cases.'" Id. at 105, quoting, Lockett v. Ohio, 438 U.S. 586, 606 (1978) (opinion of Burger, C.J.). In Eddings, the trial court refused to consider in mitigation "[e]vidence of a difficult family history and of emotional disturbance...typically introduced by defendants in mitigation." 455 U.S. at 115.

In Petitioner's case, the jury was precluded from considering crucial mitigating evidence about Petitioner's background and the circumstances of the case, by trial counsel's failure to present such evidence. Thus, the resulting imposition of the death sentence was rendered

constitutionally deficient by trial counsel's ineffectiveness, just as the trial court's rulings rendered Eddings' sentencing unconstitutional.

At the penalty phase, trial counsel presented no psychiatric evidence of Petitioner's diagnosed mental illness of paranoid schizophrenia. Psychiatrists Dr. Lloyd T. Baccus and Dr. Louis J. Jacobs would have testified to their diagnoses of Petitioner's paranoid schizophrenia, as well as to a description of the characteristics of this psychosis and its long term development in Petitioner. (Affidavits of Dr. Baccus and Dr. Jacobs, Pet. Ex. 6 and 7). However, defense counsel did not ask either Dr. Baccus or Dr. Jacobs to testify.

While Dr. Baccus, Dr. Jacobs and psychiatrist Dr. B.N. Hirani had testified about Petitioner's psychosis and inability to assist defense counsel for the defense during an earlier hearing concerning Petitioner's competency to stand trial (T. Comp. 246-356)[3] they were not called by the defense to testify during the sentencing phase. Therefore, as different juries sat at the competency trial and the trial on the merits, the jury at the penalty phase did not hear the psychiatrists' testimony. Trial counsel attempted to introduce psychiatric evidence during the guilt/innocence phase through Dr. Hirani. However, Dr. Hirani testified no further than his diagnosis of Petitioner and a brief description of the illness when the trial judge excluded any such testimony as irrelevant and inadmissible. (T. 384-88, 401).[4]

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3. Each reference to the transcript of Petitioner's trial on issue of his competency to stand trial will be referred to as "T. Comp.," followed by the page on which the reference may be found.

4. The trial court ruled that psychiatric evidence was inadmissible in the guilt-innocence phase to show a lack of intent to commit the offense (T. at 399-401).

Trial counsel's failure to present psychiatric evidence in mitigation falls far below any minimal level of competence. There can be no plausible strategic reason put forth to explain this glaring omission. At the state habeas corpus hearing, trial counsel testified that he did not attempt to introduce psychiatric evidence at the penalty phase because he felt that the jury was aware that there was a psychiatric problem from the testimony which had been stricken during the guilt-innocence phase (H. 91-92). Trial counsel's testimony, however, cannot be labelled as "strategy," as his reasoning flies in the face of basic evidence rules concerning effect of evidence stricken from the record. In the instant case, the argument concerning the relevance of the psychiatric evidence took place in the presence of the jury. (T. 389-401). The jury also heard the trial judge state that he saw no relevance in the psychiatric evidence (T. 401). After hearing the judge's ruling during the guilt-innocence phase that the psychiatric evidence had no relevance, and further hearing no psychiatric evidence during the penalty phase, the jury could only have concluded that the psychiatric evidence had no relevance whatsoever in their deliberations. This result is aggravated by the absence of a jury instruction that mental illness could be considered as a mitigating factor (T. 551), and the failure of defense counsel to inform the jury that mental illness is a mitigating factor. (T. 546-558).

Additionally, trial counsel asserted at the habeas corpus hearing that at the penalty phase some witnesses testified "from a lay standpoint" about Petitioner's mental

condition (H. 92). Again, this assertion does not lessen the crucial mitigating nature of the psychiatric testimony which was not presented to the jury. While the three lay witnesses testified to some of their observations of Petitioner's conduct which appeared strange, they did not give nor were they in any way qualified to give an opinion as to whether Petitioner suffered from a medically diagnosed mental illness (See, T. 480-86; 494-501; 506-14). Thus, at the sentencing hearing, trial counsel failed to present the strongest and most crucial evidence regarding Petitioner's mental illness which was readily available to the defense. Only within the context of this psychiatric evidence could personal observations by family and friends serve as meaningful examples of the medical diagnosis of paranoid schizophrenia. The grave nature of the omission of psychiatric evidence during the penalty phase is brought into even clearer focus by Augustine's testimony during the habeas corpus hearing, that he regrets not having presented the psychiatric evidence (H. 92).

In addition to the omission of mitigating psychiatric evidence, trial counsel also failed to present to the jury mitigating evidence of Petitioner's difficult childhood and family background. Though there was some testimony concerning Petitioner's poverty, trial counsel failed to present evidence that Petitioner's mother had developed an excessive drinking problem when Petitioner was a baby, and left the family during Petitioner's childhood, after which the children were left without supervision while their father was at work. (H. 25-27; Affidavit of Doreatha Jenkins, Pet. Ex. 4). Again, this is the sort of evidence

which the Court in Eddings recognized as "typically introduced by defendants in mitigation." 455 U.S. at 115.

Trial counsel further failed to present evidence that Petitioner had no prior criminal record. The omission of this important mitigating evidence, together with the failure to present mitigating evidence of Petitioner's psychosis and family history resulted in an unreliable sentencing determination; for "'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant -- if not essential -- [to the] selection of an appropriate sentence...'" Lockett v. Ohio, 438 U.S. at 603, quoting, Williams v. New York, 337 U.S. 241, 247 (1949) (emphasis added).

In addition to the failure to present the mitigating evidence concerning Petitioner's "life and characteristics," trial counsel failed to call the victim's father, Thomas Rowry, as a witness during the penalty phase to testify that he did not want Petitioner to be sentenced to death. At the state habeas corpus hearing, trial counsel admitted knowing that Mr. Rowry had told a defense investigator that he would so testify. (H. 84-87). However, trial counsel could give no reason or explanation for his failure to call Mr. Rowry as a witness. (H. 87; Pet. Ex. 1 and 3). Without the benefit of hearing Mr. Rowry's request for mercy for Petitioner, the jury was left without an important piece of mitigating evidence concerning the circumstances of the case.

Petitioner's claim, therefore, is that by trial counsel's failure to present crucial mitigating evidence during the penalty phase, trial counsel did not render effective

assistance of counsel, in violation of Petitioner's Sixth, Eighth and Fourteenth Amendment rights. In order to resolve this significant constitutional question, Petitioner respectfully seeks certiorari from this Court.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW A WITNESS TO TESTIFY TO HER OPINION ON WHETHER OR NOT PETITIONER SHOULD BE SENTENCED TO DEATH PREVENTED THE JURY FROM CONSIDERING MITIGATING EVIDENCE, THEREBY VIOLATING PETITIONER'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Petitioner's case was prevented in the penalty phase from considering mitigating evidence, when the trial court ruled that Petitioner's witness, Doreatha Jenkins, could not give her opinion of whether or not Petitioner should be sentenced to death (T. 503). This limitation of mitigating evidence violates the holding of Lockett v. Ohio, 438 U.S. 586 (1978), and the language of Georgia Code Ann. § 27-2534.1 (b) which dictates that the jury consider "any mitigating circumstances." Further, the exclusion of this mitigating evidence violated the Due Process Clause of the Fourteenth Amendment by failing to follow the dictates of this Court that the state's rules of evidence "may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Green v. Georgia, 442 U.S. 95 (1979).

The trial court's exclusion of the opinion evidence was based on Georgia Code Ann. § 38-1708, which states:

> Where the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to his opinion or belief, giving reasons therefor; but if the issue shall be as to existence of a fact, the opinions of witnesses, shall be inadmissible.*

* Under the revised Georgia Code, effective November 1, 1982, § 38-1708 is found at Georgia Code Ann. § 24-9-65. The rule remains substantively the same.

Initially, it should be noted that the opinion evidence in question is not clearly inadmissible under the above cited Georgia rule of evidence, which permits a witness to testify to an opinion or belief where the jury question is one of opinion. The defense witness, Doreatha Jenkins, had testified to her knowledge of Petitioner's personality, having known him since he was a child, as Petitioner's first grade teacher, and having employed Petitioner, as a young man, to do yard work. (T. 494-503). Based on these facts, Jenkins could have given reasons for her opinion that Petitioner should not be sentenced to death, an opinion arguably admissible under the Georgia rules of evidence.

Assuming, arguendo, that the opinion evidence was inadmissible under the state rules of evidence, the trial court's exclusion of the evidence violates the rule of Chambers v. Mississippi, supra, against mechanistic application of the state's rules of evidence. In Chambers, the Court stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Id. at 302. Certainly in a capital case, the critical nature of this fundamental right becomes even more significant, particularly in view of the broader scope of admissibility of evidence offered in mitigation. In Gregg v. Georgia, Justice White stated:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute.... 428 U.S.153,222 (opinion of White, J., joined by Burger, C.J. and Rehnquist, J.).

Further, in Lockett v. Ohio, Chief Justice Burger wrote:

> ...[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 438 U.S. at 604 (opinion of Burger, C.J., joined by Justices Stewart, Powell and Stevens).

Thus, a defendant in a capital case must have the opportunity to present any mitigating evidence to guide the jury in the exercise of its sentencing discretion, including evidence "too intangible to write into a statute." Gregg v. Georgia, supra. In Petitioner's case, the opinion evidence of Jenkins, based on her knowledge of Petitioner, would have provided such mitigating evidence. Thus, under these circumstances, the overly strict application of the state rule of evidence resulted in the exclusion of relevant mitigating evidence and the denial of Petitioner's due process rights as guaranteed by the Eighth and Fourteenth Amendments.

Petitioner's claim, therefore, is that in refusing to allow Petitioner's witness to testify to her opinion as to whether or not Petitioner should be sentenced to death, the trial court prevented the jury from considering mitigating evidence, contrary to the rules of Gregg v. Georgia, Lockett v. Ohio, Chambers v. Mississippi and Green v. Georgia, supra. The exclusion of the mitigating evidence violated Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments. It is in order to resolve this significant constitutional question that Petitioner respectfully seeks certiorari from this Court.

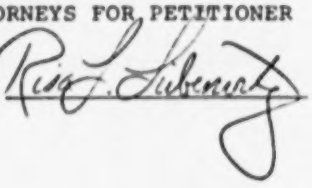
CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

RISA LIEBERWITZ
ELYSE AUSSENBERG

ATTORNEYS FOR PETITIONER

BY: 

Dated: February 17, 1983
Ithaca, New York

ten days. Since his release, he has worked as a law clerk in various law offices. Nichols offered evidence of his good character and his participation in religious activities as well as evidence that he had made restitution for all funds previously misappropriated.

There was also evidence offered by the State Bar from which the Special Master found that Nichols had engaged in giving legal advice, preparation of documents and closing a loan for members of the public without revealing the fact that he was not at the time a licensed attorney. The Special Master concluded that these actions constituted the unauthorized practice of law in violation of Ga. Code Ann. § 9-401, et seq. The Special Master further found that the crime of embezzlement while acting as a court officer is extremely serious and has not been offset by a sufficiently long period of rehabilitation.

We have held that an applicant for reinstatement as a practicing lawyer has the burden of proving by clear and convincing evidence that he has been sufficiently rehabilitated. *In the Matter of Ansley*, 241 Ga. 394 (245 SE2d 657) (1978); *In the Matter of Johnson*, 244 Ga. 109 (259 SE2d 57) (1979). We hold that no such proof has been offered in this case.

Application for reinstatement denied. Jordan, C. J., Hill, P. J., Marshall, Clarke, Smith and Gregory, JJ., concur.

DECIDED SEPTEMBER 30, 1981.

Application for reinstatement.

Omer W. Franklin, Jr., General Counsel State Bar, Joe David Jackson, Assistant General Counsel State Bar, for State Bar of Georgia.

Groover & Childs, Frank H. Childs, Jr., for Nichols.

37517. WALLACE v. THE STATE.

JORDAN, Chief Justice.

This is a death case. The appellant, Robert Lewis Wallace, was indicted for the murder of a Union Point police officer, an aggravated assault committed upon another Union Point police officer, the theft of a Union Point police vehicle, and driving under the influence. Although the offenses occurred in Greene County, a change of venue was granted and the appellant was tried in Baldwin County Superior Court. He was found guilty of all charges. The jury found the existence of three aggravating circumstances and returned a death sentence. The trial court sentenced the appellant to death for the murder, twenty years imprisonment for the aggravated assault, seven

years for the motor vehicle theft, and one year for driving while intoxicated — all sentences to be served consecutively.

The case is here on direct appeal, and for mandatory review of the death sentence.

From the evidence presented at trial, the jury was authorized to find the following facts:

The appellant was at the home of his girlfriend, Teresa Herring, on May 15, 1979. He was drinking and around midnight decided to drive to Atlanta to find a job. His girlfriend gave a statement to the GBI in which she said that she did not want him to leave and told him he would be stopped by the police for driving while intoxicated. He replied to the effect that if he were to be stopped by the police he would "shoot hell out of them." At trial she partially recanted her statement. The appellant had a shotgun, a pistol and three rifles in the car when he left Teresa Herring's home.

Just after midnight on May 16, 1979, officers Rowry and Cook were patrolling the City of Union Point. The officers observed the appellant's car weaving across the centerline and going on and off the shoulder of the road. The officers stopped the appellant and, smelling alcohol on his breath, gave him a field test which was positive. They asked appellant for his driver's license. Appellant told the officers it was not on his person and started to rummage through a box in the back of the car. The officers ordered him to stop and transported him to jail for a formal breath test.

After being transported, appellant was given a breath test which revealed a .11% blood alcohol content. He was told by the police that they would have to lock him up for driving under the influence and that he could be released on bond after four hours. Officer Rowry then left the room and went to prepare a cell. The appellant, alone with Officer Cook, begged not to be locked up. Officer Cook then took the appellant by the arm and told him to come on. At that point, appellant grabbed the officer's .357 magnum pistol and they grappled. Officer Rowry, hearing the scuffle, came back to help just as Officer Cook was shot in the lower abdomen. Officer Cook fell and momentarily lost consciousness. Appellant then shot Officer Rowry in the neck. Officer Rowry turned and ran, at which time appellant again fired but missed. He then turned and pointed the gun in Officer Cook's face from a distance of less than 2 feet and fired. However, Officer Cook moved his head and was not shot but received cuts from debris and powder burns. The appellant fled the scene in a patrol car.

Officer Cook was able to summon help. He was transported to a hospital and survived. Officer Rowry's body was found down the street from the jail.

Appellant hid the patrol car in the woods in Wilkes County and

then made his way to his brother's home. He told his brother of the shooting and asked him to look into it. The brother found out that one of the officers died and that it was dangerous for appellant to stay around. Appellant decided to go to Atlanta. His brother gave him a .22 magnum pistol, which appellant took to Atlanta, along with a shotgun he had taken from the patrol car.

In Atlanta, appellant could not find a place to stay. Finally, he found a vacant basement apartment which he thought was in a deserted building. However, a woman lived upstairs. When she heard noises she called the Atlanta police, who investigated. They found the appellant behind a barricaded door. When he was arrested, he was reaching for the shotgun. When asked about the incident in Union Point, the appellant said he shot one officer in the stomach but didn't remember shooting anyone else. He stated he shot the officer because they were too lax and not paying attention to what they were doing. However, he said they had been nice to him. He further stated he had started to shoot the arresting officers but surrendered instead.

Appellant led officers back to the stolen patrol car but refused to show the officers where he hid the gun. He said in reply to their request, "No murder weapon, no case."

Appellant's father testified that appellant was nice unless he didn't get his way and then he becomes upset. Appellant presented evidence of mental disease that had been diagnosed as schizophrenia, latent-type. However, appellant did not contend that he was insane at the time of the commission of the offense.

1. Appellant filed a special plea of insanity contending that he was incompetent to stand trial. A competency hearing was held and the jury determined that appellant was competent. His first enumeration of error asserts the general grounds as to the jury's finding that he was competent to stand trial.

"The issue raised in a plea of mental incompetency to stand trial is whether an individual is capable of understanding the nature and object of the proceedings, whether he comprehends his own condition in reference to such proceedings and whether he is capable of rendering his counsel assistance in providing a proper defense ... The question is not whether he will assist in his defense, but whether he is capable of doing so." *Banks v. State*, 246 Ga. 178, 181 (269 SE2d 450) (1980). Appellant did not contest the first two issues, but asserted below through counsel that he was incapable of rendering his counsel assistance in providing a proper defense.

The defense presented evidence from the appellant's father, sister and minister during the hearing on the special plea. The father and sister testified that appellant had sniffed gas as a child but had stopped. They also testified that he worked and drove a car. His sister

testified that if you did not know appellant, he was hard to talk to because he carried on conversations about multiple subjects. However, she also testified that if you "go back and find out what he is talking about then it starts to make sense." The Reverend General Lee Avery testified that he observed appellant in jail and that he complained of having venereal disease and other phantom illnesses, that his conversations at times did not make sense and he was getting progressively worse. Appellant's attorneys, both presently retained counsel and former appointed counsel, testified he sometimes would not talk about the case, his conversation would wander off the subject, and he could not effectively communicate relevant facts regarding his defense.

Appellant also introduced expert psychiatric testimony. Dr. B. H. Hirane and Dr. Louis Jacobs examined appellant on three occasions at Central State Hospital. After each of the first two examinations, the doctors found appellant competent to stand trial. However, on his last examination, they found appellant incompetent in that his condition had progressed to the point that his thought processes were so "loose" he could not communicate. A private psychiatrist, Dr. Baccus, also testified that appellant was incompetent to stand trial. His conclusion was reached at a time when the other psychiatrists had found appellant competent. He further testified that appellant became more physically unkempt on each interview.

However, the State elicited evidence that appellant had been advised by his attorneys not to talk to the medical staff about the elements of the crime. Appellant also refused to participate in any psychological testing. Furthermore, the private psychiatrist testified that his evaluation was based in part on appellant's previous history, which in some instances was not entirely correct, especially as to prior audio hallucinations. The appellant knew of the purpose of the examinations, that two of the examining physicians were employed by the State and that if found to be incompetent he could not stand trial. All the expert witnesses testified appellant was intelligent enough to fake his condition but they were of the opinion he was not faking.

Testimony from jailors and another prisoner established that the appellant read, wrote coherent letters, made phone calls, painted in his cell, carried on ordinary conversations, and displayed proper personal hygiene. The State also presented evidence that appellant gave a detailed, accurate, and lucid description of the crime and where the car was hidden to officers after his arrest.

The trial of a special plea of insanity is in the nature of a civil proceeding and the burden of producing evidence is on the de-

fendant *Spencer v. State*, 236 Ga. 697 (224 SE2d 910) (1976); *Corn v. State*, 240 Ga. 130 (6) (240 SE2d 649) (1977); *Banks v. State*, supra. We do not agree with appellant's argument that in a death case the State should have the burden of disproving all mitigating circumstances, including competency. In this context, incompetency at time of trial is not a mitigating circumstance. See *Fair v. State*, 245 Ga. 868 (268 SE2d 316) (1980).

The constitutionality of placing the burden of proving insanity upon the defendant has been recognized by this court and by the Supreme Court of the United States. *Durham v. State*, 239 Ga. 697 (238 SE2d 334) (1977); Patterson v. New York, 432 U. S. 197 (97 SC 2319, 53 LE2d 281) (1977).

The weight and credibility to be given the testimony of witnesses is in the exclusive province of the jury. *Hogan v. State*, 221 Ga. 9 (142 SE2d 778) (1965); *Strong v. State*, 232 Ga. 294 (206 SE2d 461) (1974).

If the facts are given on which opinions are based, laymen are competent to give opinions on a person's mental condition. *Coker v. State*, 234 Ga. 556 (216 SE2d 782) (1975), revd. on other grounds, 433 U. S. 584 (97 SC 2861, 53 LE2d 982); *Carrelley v. State*, 145 Ga. App. 29 (243 SE2d 307) (1978).

Competent testimony having established an issue for the jury, we find no merit in this enumeration. *Leggett v. State*, 244 Ga. 226 (259 SE2d 476) (1979). See *Strickland v. State*, 247 Ga. 219 (275 SE2d 29) (1981).

2. In his second enumeration of error appellant asserts that the trial court erred in limiting his counsel's voir dire examination of prospective jurors on the trial of the special plea of insanity. Code Ann. § 59-705. Each juror was asked whether he would follow a charge of the court as to mental competency and whether the juror could set aside any evidence which might be elicited pertaining to guilt or innocence of the actual charges. The trial court sustained objections to both questions. Both questions were of a technical legal nature as they were subjects of the instruction by the court at the conclusion of the trial. They therefore were not a proper area for voir dire examination. *Smith v. State*, 238 Ga. 146 (231 SE2d 757) (1977); *Black v. State*, 234 Ga. 19 (214 SE2d 514) (1975); *Pinion v. State*, 225 Ga. 36 (165 SE2d 708) (1969).

3. In his third enumeration of error, appellant argues that the trial court erred in excluding relevant evidence offered by him during the trial on his special plea of insanity. Appellant attempted to introduce photographs of the unkept interior of the house he occupied at least some of the time prior to his arrest. The State offered evidence of the neat condition of appellant's cell and his personal hygiene. The trial court excluded the photographs as being

irrelevant in that they bore on the mental condition of the appellant prior to the crime. Appellant's own witness, Dr. Baccus, testified as to the deteriorating personal hygiene and appearance of the appellant on each occasion he was examined, and other defense experts testified that appellant had deteriorated during confinement so that although initially competent, he was not then able to communicate effectively with counsel. The issue at a hearing upon a special plea of insanity was the mental competency of the appellant to stand trial. The trial court did not err in limiting the evidence to his mental state after his arrest. *Cochran v. State*, 212 Ga. 245 (91 SE2d 601) (1956).

4. During the competency hearing, the district attorney in cross examining one of the appellant's expert witnesses asked "If under the law, . . . if he had . . . no defense to present, whether he is competent or not, it wouldn't matter would it?" Appellant contends that the trial court erred in permitting the question. We do not agree. Pretermitting waiver, the line of questioning was testing the doctor's standard used to determine competency.

This line of questioning began as follows:

"Q. Do you understand that the matter of competency depends upon whether or not he is able to understand the charges against him, whether or not he is able to understand his relationship to that situation, and whether or not he is able at this time to assist his attorney in the preparation and presentation of his defense, if he has a defense?

"A. Yes, sir.

"Q. Now, if he does not have a defense, then he would have nothing to contribute, would he, doctor?"

The district attorney then asked, "Now understanding this how did you decide that he was incompetent at this time?" There was no contemporaneous objection.

Appellant further asserts that the trial judge erred in allowing the State to introduce his statements after arrest along with testimony of eyewitnesses who corroborated the statements. While it is true that evidence of the guilt of a defendant is irrelevant at a trial of a special plea of insanity, statements of a defendant may be introduced even though they are inculpatory in nature for the purpose of illustrating mental condition and the defendant's ability to communicate after the crime. *Cochran v. State*, supra. The trial court carefully instructed the jury that the evidence was being offered for the sole purpose of determining mental competency and was not to be considered as bearing on the guilt or innocence of the accused. Nor do we find error in the State's cross-examination of a defense expert as to whether he found the appellant "responsible as to the crime."

Appellant's fourth, fifth, sixth and seventh enumerations of error are without merit.

5. In the instant case, both the murder victim and the appellant were of the same race. At the guilt-innocence phase of the trial, defense counsel on voir dire asked a juror whether she belonged to any organization that excluded black people. The district attorney objected on the ground that race was not an issue and such a question would inject a racial issue into the case. The trial court sustained the objection and the appellant asserts error, citing *Cowan v. State*, 156 Ga. App. 650 (275 SE2d 665) (1980), and Ham v. South Carolina, 409 U. S. 524 (93 SC 848, 35 LE2d 46) (1972).

Prior to trial defense counsel submitted a written voir dire questionnaire which the trial court in its discretion allowed to be used. That questionnaire inquired about all social, religious, fraternal services or charitable organizations to which each juror belonged. Appellant therefore had in his possession a list of organizations to which each juror belonged.

In *Cowan v. State*, supra, the Court of Appeals held that a denial by the trial court of counsel's request to inquire into the fraternal, social, or other organizations to which each juror belonged was error in light of the statute, Code Ann. § 59-705, which expressly grants that right. That was not the case here where counsel was expressly afforded that right.

Ham v. South Carolina dealt with a trial judge's refusal to allow inquiry into racial prejudice any veniremen might have had against the defendant. That also is not in issue here.

The trial court did not abuse his discretion prohibiting further inquiry. *Ruffin v. State*, 243 Ga. 95 (252 SE2d 472) (1979).

6. In his ninth enumeration of error, appellant contends that the trial court erred in admitting into evidence rifles found in the trunk of his car. Appellant argues that since there was no testimony that the weapons were loaded, or that they were used in an illegal manner, or that appellant reached for them, they were irrelevant as to any issue. We do not agree. The statement of his girlfriend, later recanted at trial, showed that appellant said he would shoot any officer who stopped him. There also was testimony that appellant had a shotgun and pistol in the car with him. Evidence of other weapons in the automobile was relevant to show how heavily armed the appellant was and to illustrate his state of mind. This enumeration is without merit. See *Wall v. State*, 126 Ga. 86 (4) (54 SE 815) (1906); *Castleberry v. State*, 152 Ga. App. 769 (264 SE2d 239) (1979).

7. The trial court did not err in failing, upon written request, to charge on voluntary manslaughter as there was no factual basis for

such a charge. In fact, according to defendant's own statement, the officers were "nice" to him. *Gilreath v. State*, 247 Ga. 814 (279 SE2d 650) (1981); *Stevens v. State*, 247 Ga. 698 (278 SE2d 398) (1981); *Strickland v. State*, 247 Ga. 219 (275 SE2d 29) (1981); *Hardy v. State*, 245 Ga. 272 (264 SE2d 209) (1980).

8. The trial court charged Code Ann. § 26-1101, including implied malice. Appellant's argument that such a charge is burden shifting or creates an impermissible inference has been raised before and decided to the contrary. *Franklin v. State*, 245 Ga. 141 (263 SE2d 666) (1980); *Burney v. State*, 244 Ga. 33 (257 SE2d 543) (1979).

However, appellant further argues that the trial court's exclusion of evidence of his mental state at the time of the commission of the crime proffered during the guilt-innocence phase of the trial, along with the charge of implied malice, relieved the State from proving an essential element of the crime.

Appellant's counsel attempted to introduce expert evidence to the effect that appellant suffered from a mental disease which could have lessened his ability to form an intent to murder or render him unable to form the requisite malice. However, defense counsel clearly informed the court in argument when the State objected that the defense was not contending that appellant was insane at the time of the commission of the crime under the tests for criminal responsibility. Therefore, the trial court properly excluded the evidence as irrelevant to guilt-innocence. Mental abnormality, unless it amounts to insanity, is not a defense to a crime. *Berryhill v. State*, 235 Ga. 549 (221 SE2d 185) (1975).

Appellant's eleventh and twelfth enumerations of error are without merit.

9. The trial court charged the jury during the guilt-innocence phase of the trial on burden of proof, presumption of innocence, reasonable doubt, direct and circumstantial evidence, and that the burden is not upon the defendant to establish his innocence but that the burden is upon the State to prove his guilt. The trial court further charged the jury as follows: "I charge you that a person will not be presumed to act with criminal intention but the trier of facts . . ., may find such intention upon consideration of words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. A specific intent to commit the crime . . . is an essential element that the State must prove beyond a reasonable doubt. Intent may be shown in many ways provided the jury finds that it existed from the evidence produced before them. *It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act.*" Appellant argues that the italicized portion of the charge

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violated the rule of Sandstrom v. Montana, 442 U. S. 510 (99 SC 2450, 61 LE2d 39) (1979), because the charge created a conclusive presumption and was burden shifting. We do not agree. *Rakestraw v. State*, 155 Ga. App. 563 (271 SE2d 696) (1980). Of course, a jury instruction should not be examined in isolation but the charge must be examined as a whole. *Blankenship v. State*, 247 Ga. 590 (277 SE2d 505) (1981). From the charge, read as a whole, the jury only could have understood that appellant could not be convicted unless the State proved criminal intent beyond a reasonable doubt and that for the State to prove intent, the State must prove beyond a reasonable doubt that the requisite criminal intent was the natural and necessary consequence of proven acts. For, the presumption "allows but does not require . . . the trier of fact to infer the [element of the crime] from proof by the prosecution of the basic [fact] and that places no burden of any kind on the defendant." County Court of Ulster County, New York v. Allen, 442 U. S. 140 (99 SC 2213, 60 LE2d 777) (1979); *Tucker v. State*, 245 Ga. 68 (263 SE2d 109) (1980). See *Denton v. State*, 154 Ga. App. 427 (268 SE2d 725) (1980), concurring opinion, Carley, Judge.

Furthermore, there was evidence before the jury of objective conduct demonstrating criminal intent. United States v. Caucci, 635 F2d 441 (5th Cir. 1981).

10. During the sentencing phase of the trial, the defense called Aretha Jenkins, the appellant's first teacher, as a witness. Defense counsel asked the witness whether she thought the appellant should be sentenced to death and the State's objection was sustained. Appellant argues that the exclusion of this testimony prevented the jury from considering all mitigating circumstances, citing Lockett v. Ohio, 438 U. S. 586 (98 SC 2954, 57 LE2d 973) (1978).

The witness was allowed to testify as to the facts and circumstances of the appellant's life that were of a mitigating nature and the trial court did not err in excluding the personal opinion of the witness as to whether the death penalty should be imposed. *Brooks v. State*, 244 Ga. 574 (5) (261 SE2d 379) (1979); *Collier v. State*, 244 Ga. 553 (261 SE2d 364) (1979).

11. In his last two enumerations of error, the appellant contends that a Witherspoon qualified jury deprived him of a jury chosen from a fair cross section of the community and that in addition, a jury qualified under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968) would be guilt-prone, or in effect a "hanging jury." Both these arguments have been raised before and decided adversely to appellant's position. *Brown v. State*, 247 Ga. 298 (275 SE2d 52) (1981), and cits; *Nelson v. State*, 247 Ga. 172 (274 SE2d 317) (1981), and cits.

Sentence Review

As required by Georgia Laws 1973, p. 159 et seq. (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crime and the defendant. We conclude that the sentence of death in this case was not imposed under the influence of passion, prejudice or any arbitrary factor.

12. The evidence, when viewed as a whole, is sufficient to authorize a rational trier of fact to find the appellant guilty of the crimes charged beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (79 SC 2781, 61 LE2d 560) (1979).

13. The charge of the trial court complied with the standards set forth in *Spivey v. State*, 241 Ga. 477 (246 SE2d 288) (1978); *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977); and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977).

14. The jury found the following statutory aggravating circumstances to exist beyond a reasonable doubt: (1) The offense of murder was committed against a peace officer while engaged in the performance of his official duties, Code Ann. § 27-2534.1 (b) (8); and (2). The offense of murder was committed by a person in the lawful custody of a peace officer. Code Ann. § 27-2534.1 (b) (9).

We find that the evidence factually supports the jury's finding of both aggravating circumstances beyond a reasonable doubt. Jackson v. Virginia, supra. Cf. *Stevens v. State*, supra.

The murder was of an officer engaged in the performance of his official duties. It occurred during the attempt to kill a fellow officer in an execution-type shooting which would have been fatal had the wounded officer not moved his head. In appellant's own words, the officers had been "nice to him." Furthermore, appellant made every effort to escape and avoid apprehension for his crime.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the following similar cases listed in the appendix support the affirmance of the death penalty.

The thirteen cases in which the jury returned a death penalty support the death penalty in the instant case. All of the cases with the exception of *Jones* involved the deliberate killing of a police officer and thus show a jury's willingness throughout the state to give the death penalty under these circumstances. *Jones* similarly supports the sentence of death in that it involved the deliberate murder of a security guard. Thus, murderers of police officers are not "a

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CLARKE, Justice.
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capriciously selected group of offenders." Gregg v. Georgia, 428 U. S. 153, 199 (96 SC 2909, 49 LE2d 859) (1976). In one of the cases which supports a sentence of death, mental disease or disturbance was offered in mitigation.

Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. Hill, P. J., Marshall, Clarke, Smith and Gregory, JJ., concur.

DECIDED SEPTEMBER 30, 1981.

Murder, etc. Greene Superior Court. Before Judge Duke.

Katrina L. Breeding, August Siemon, for appellant.

Joseph H. Briley, District Attorney, Arthur K. Bolton, Attorney General, Nicholas G. Dumich, Assistant Attorney General, for appellee.

APPENDIX.

Johnson v. State, 226 Ga. 378 (174 SE2d 902) (1970); *Callahan v. State,* 229 Ga. 737 (194 SE2d 431) (1972); *Whitlock v. State,* 230 Ga. 700 (198 SE2d 865) (1973); *Bennett v. State,* 231 Ga. 458 (202 SE2d 99) (1973); *Ross v. State,* 233 Ga. 361 (211 SE2d 356) (1974); *Spencer v. State,* 236 Ga. 697 (224 SE2d 910) (1976); *Fleming v. State,* 240 Ga. 142 (240 SE2d 37) (1977); *Willis v. State,* 243 Ga. 185 (253 SE2d 70) (1979); *Jones v. State,* 243 Ga. 820 (256 SE2d 907) (1979); *Collier v. State,* 244 Ga. 553 (261 SE2d 364) (1979); *Lewis v. State,* 246 Ga. 101 (268 SE2d 915) (1980); *McCleskey v. State,* 245 Ga. 108 (263 SE2d 146) (1980); *Stevens v. State,* 247 Ga. 698 (278 SE2d 398) (1981).

37603. WHARTON v. JONES.

CLARKE, Justice.

The issue before us in the state's appeal from a grant of habeas corpus is whether petitioner was denied effective assistance of counsel. Petitioner Jones pled guilty to two counts of burglary and two counts of theft by taking and was sentenced to five years for each count of burglary, five years for one count of theft by taking and two years for the other count of theft by taking. The habeas court found that he had received ineffective assistance of counsel. We affirm.

An attorney with the public defender's office was appointed to

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ROBERT LEWIS WALLACE,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5507
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
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RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Greene County. Petitioner was convicted of murder, aggravated assault, motor vehicle theft, and driving under the influence. He was given a death sentence for the murder, twenty years imprisonment for the aggravated assault, seven years for the motor vehicle theft, and one year for driving under the influence. His convictions and sentences were affirmed on direct appeal. Wallace v. State, 248 Ga. 255 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 121 numbered paragraphs of which 103 allege substantive claims for relief (18-120). The Court will address these claims for relief by paragraphs corresponding numerically to the paragraphs in the petition.

The record in this case consists of the transcript of proceedings before this Court on May 13, 1982; the affidavits of August F. Siemon, Katrina Breeding, Edward E. Augustine, Mary Barnett, Vincent Keith Martin, Doreatha Jenkins, Dr. Louis J. Jacobs, and Dr. Lloyd T. Baccus; and the record and transcript of Petitioner's trial in the Greene Superior Court which was conducted in the Baldwin County Superior Court pursuant to a change of venue.

18-23

In paragraphs 18-23, Petitioner claims he was tried while mentally incompetent to stand trial in violation of his rights to due process and a reliable sentencing determination under the Eighth and Fourteenth Amendments.

FINDINGS OF FACT

The Supreme Court has already affirmed the jury's finding that Petitioner was competent to stand trial. Wallace v. State, supra at 257(1). In making this determination the Court noted that incompetency at time of trial is not a mitigating circumstance. Id.

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon the Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974).

Accordingly, the allegations in paragraphs 18-23 are found to be without merit.

24-26

In paragraphs 24-26, Petitioner challenges the

constitutionality of the change of venue of his trial from Greene County to Baldwin County. He claims that the change of venue violated his right to due process and to a fair trial under the Fifth, Sixth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

Petitioner's appointed counsel filed a motion for change of venue on June 22, 1979. (R. 21). Petitioner's retained counsel adopted the motion, among others, when he entered the case. (R. 39,43). A ruling on the motion was deferred until the process of jury selection began. (M.T., Sept. 4, 44-49). Counsel for Petitioner subsequently filed a special plea of incompetency to stand trial. (M.T., Sept. 4, 56; R. 86).

Jury selection for the competency trial began on September 11, 1979, in Greene County. Of the first twelve jurors questioned, two jurors were disqualified because of their relationships to parties involved (Sp.P.Tr., Sept. 11, 21;23); four jurors were excused for cause because of their fixed opinions (Id. at 41; 45; 68; 82); and six jurors were qualified. (Id. at 37; 53; 61; 64; 74; 76).

At that point the prosecutor stated that he did not believe they could get a jury for the competency trial and withdrew the State's objection to the change of venue motion. (Id. at 82). The trial court granted the change of venue motion. (Id. at 82-83). Counsel for Petitioner immediately attempted to withdraw the change of venue motion, but the trial judge replied that the motion had already been granted, it appearing

that an impartial jury could not be obtained. Id.

Counsel filed an appeal on the granting of the change of venue; the appeal was dismissed because the order appealed from was not a final judgment in that no county had been designated to which the case would be transferred. (R. 141). Counsel's second appeal on the venue change was dismissed as it was not timely filed. (R. 128).

CONCLUSIONS OF LAW

Under Georgia law, a decision to grant a motion for change of venue lies within the sound discretion of the trial judge, and such decision will not be disturbed on appeal absent a showing of abuse of discretion. Jarrell v. State, 234 Ga. 410(2)(1975); Jordan v. State, 247 Ga. 328, 337 (1981).

Petitioner has claimed that the granting of the change of venue was racially motivated but presents no evidence to support such contention. Petitioner claims a second reason for the venue change was that the population of Baldwin County is allegedly desensitized to mental illness because of the presence of Central State Hospital. There is no evidence to support this contention.

Thus, the Court finds that Petitioner has made no showing of an abuse of discretion in granting the change of venue motion.

Petitioner also claims that trial counsel were ineffective in handling his change of venue motion. The Court finds this argument unconvincing and rules that no Sixth and Fourteenth Amendment rights of Petitioner were violated.

Accordingly, the allegations in paragraphs 24-26 are found to be without merit.

27-29

In paragraphs 27-29, Petitioner claims that he was denied effective assistance of counsel during both the guilt/innocence and sentencing phases of his trial in violation of his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Counsel were appointed in May, 1979, to represent Petitioner. (R. 11). In July, 1979, however, Edward E. Augustine was retained to represent Petitioner. (R.23). Mr. Augustine had the case for 6 months prior to trial and was paid $10,000.00.

Mr. Augustine represented Petitioner at both his trial on the special plea of incompetency and at his trial in chief. He was assisted at trial by attorneys Katrina Breeding and August Siemon. Ms. Breeding and Reverand General Lee Avery assisted Mr. Augustine in his pretrial investigation and preparation.

Counsel filed numerous pretrial motions. (R. 24-26; 31-44; 46-86; 120-125; 129-131).

At trial, Counsel made motions (T. 7; 8; 9; 23; 37; 206); gave an opening statement (T. 224-225); cross-examined State witnesses (T. 240; 248; 251; 264; 278; 281; 288; 305; 320; 329; 343; 367); presented one defense witness in the guilt/innocence phase but the testimony of the witness was stricken (T. 384); gave closing argument in the guilt/innocence phase (T. 423-440); presented three witnesses in the sentencing phase (T. 478; 494; 504); and gave closing argument in the

sentencing phase. (T. 546-550(q)).

Mr. Augustine testified in the habeas proceeding that he did not present an insanity defense because the psychiatrists who examined Petitioner found him to have been sane at the time of the offense.

Prior to trial, Counsel filed a motion to suppress as evidence the rifles found in Petitioner's car on the night of his initial arrest in Union Point. (T. 347-364). At trial, Counsel challenged the admissibility of the weapons but did not claim that they had been illegally seized. (T. 347-364). The Supreme Court held that the weapons were admissible. Wallace v. State, supra at 261(6).

Mr. Augustine employed Dr. James Woodford to examine the lab reports and the scene of the crime for physical evidence. Counsel testified that Dr. Woodford found nothing which could be verified so as to contribute to Petitioner's defense.

Mr. Augustine did not present testimony from psychiatrists at the sentencing phase of trial because he felt that the jury was aware of Petitioner's psychiatric problem from the guilt/innocence phase, so he thought it was not necessary to put up psychiatrists. He stated that most witnesses could testify about Petitioner's condition from a lay standpoint:

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meet the test. They prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of material with which to work. The effort they put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel ineffectively handled Petitioner's trial on the merits and has cited numerous specific instances in which the lawyers were ineffective. Petitioner has buttressed this claim with affidavits from the lawyers in which they practically admit they were ineffective.

At the habeas proceeding the lawyers testified that they did most of their preparation on Petitioner's special plea of incompetency and were hopeful, even confident, of winning. After they lost the special plea trial, they were unprepared to proceed with the trial on the issues of guilt or innocence and sentence.

Mr. Augustine had the case for 6 months prior to the trial and was paid $10,000.00. He said he was not prepared to go forward after the competency trial; what he really means is that after losing the trial of the special plea, he had no defense on the merits. There is no evidence that any other lawyer could have presented anything that could have made any difference. The State's evidence was so overwhelming that Petitioner had no good defense. Defense counsel was as prepared as any lawyer could have been for the trial.

Petitioner has cited numerous instances of alleged

ineffectiveness but has made no showing of any harm or prejudice. Most of the allegations relate to tactical decisions of Counsel; these have never provided the basis for ineffective assistance. Pitts v. Glass, supra; Reid v. State, 235 Ga. 378 (1975); Hawes v. State, 240 Ga. 327 (1977). Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

As alleged by Petitioner, counsel did fail to mention to the jury at the sentencing phase that Petitioner had no prior criminal record. While this omission is noteworthy, the Court rules that the totality of assistance given by counsel does measure up to the requirement of the Sixth Amendment right to counsel.

30

In paragraph 30, Petitioner alleges that the trial judge impermissibly invaded the province of the jury in the sentencing phase when explaining the verdict forms to the jury. Specifically, Petitioner claims that the trial judge intimated that he had found the existence of at least one statutory aggravating circumstance.

FINDINGS OF FACT

The Court has reviewed the charge to the jury in the sentencing phase of trial. (T. 551-560).

CONCLUSIONS OF LAW

Ga. Code Ann. §27-2534.1(c) allows, and the Supreme Court has approved of, the use of a verdict form which summarizes the trial court's oral instructions. Spraggins v. State, 243 Ga. 73(2)(1979); Collins v. State, 243 Ga. 291(10)(1979); Tucker v. State, 244 Ga. 721(10)(1979).

Here, the trial court was merely trying to explain the use of the verdict form to the jury. Petitioner has isolated a portion of the explanation and has claimed constitutional error. It is clear, however, from an entire reading of the charge that the trial judge expressed no opinion as to aggravating circumstances and specifically told the jury so. (T. 588).

Accordingly, this allegation is found to be without merit.

31-34

In paragraphs 31-34, Petitioner claims that he was denied due process of law and the right to a fair trial because of prejudicial remarks made by the trial judge before the jury at the trial on the special plea of incompetency. Petitioner also challenges the ruling of the trial judge striking the testimony of Mr. Augustine in the competency trial. Finally, he claims that his lawyers were ineffective for failing to move for a mistrial.

FINDINGS OF FACT

The Court has reviewed the remarks alleged to be prejudicial (Sp.P.Tr. 93; 319-20; 430) and the ruling of trial court (Sp.P.Tr. 230).

During a bench conference following the trial judge's opening remarks to the jury, Mr. Augustine brought the remarks about Perry Mason to the attention of the judge. (Sp.P.Tr. 95). Mr. Augustine declined the trial court's offer to correct the remarks. (Sp.P.Tr. 96).

During the competency trial, Mr. Augustine testified as to his opinion of Petitioner's competency. (Sp.P.Tr. 207-230). Mr. Augustine, when asked the basis for his opinion,

replied, "My independent determination with the guidance of several psychiatrists, including Central State's psychiatrists, and psychiatrist from Atlanta is that Mr. Wallace is incompetent to stand trial." (Sp.P.Tr. 230). The prosecutor moved that the testimony be stricken because it was based on the opinions of others, not Mr. Augustine's own observations. (Sp.P.Tr. 230-231). The trial court struck Mr. Augustine's testimony. (Sp. P.Tr. 231-232).

CONCLUSIONS OF LAW

Petitioner has claimed that the trial judge's remarks about Perry Mason were prejudicial. Counsel, however, declined the trial court's offer of curative instructions. The Court concludes that Petitioner has waived his right to object to these statements.

Petitioner also challenges the ruling of the trial court striking the testimony of Mr. Augustine. From a reading of the transcript, it would appear that the lawyer's opinion was not based solely on facts and circumstances which he had personally observed. Graham v. State, 236 Ga. 378, 383 (1976); Lingo v. State, 224 Ga. 333, 342 (1968). The trial court's ruling was not error.

Finally, Petitioner has cited two other instances in which he alleges the trial judge expressed disfavor with Petitioner's counsel. (Sp.P.Tr. 319-320; 430). Petitioner has isolated remarks by the trial judge. While these remarks were better left unsaid, the Court does not find that the remarks, when taken in the context of the entire trial, were so prejudicial as to affect the outcome of the competency trial.

Accordingly, the claims for relief in paragraphs 31-34 are found to be without merit.

35-38

The Supreme Court has already concluded that the trial court did not err in limiting evidence in the competency trial o Petitioner's mental state after his arrest. Wallace v. State, supra at 259(3).

39-48

The allegations raised in paragraphs 39-48 have already been decided adversely to Petitioner. Wallace v. State, supra at 260(4).

49-50

In paragraphs 49-50, Petitioner alleges that the replaying of only a portion of a witness' testimony for the jury during deliberations at the competency trial violated his rights to due process and a fair trial.

FINDINGS OF FACT

The Court has reviewed the portion of the transcript wherein the jury requested to rehear a specific part of the testimony of a witness. (Sp.P.Tr., Feb. 11-12 at 499-508).

Upon learning of the request, the trial court had the jury returned to the courtroom and asked the foreman whether the jury wished to hear all or a part of the psychiatrist's testimony. The foreman indicated a specific part - whether Petitioner, at the instruction of his lawyers, had refused to participate in psychological testing. This excerpt was played for the jury.

Afterwards, defense counsel objected on grounds that the jury should have either been made to hear the entire testimony or at least all the testimony on the subject of psychological testing. The trial court overruled the objection on two grounds. First, the

witness' entire testimony was over two hours long, the jury was tired, and the court did not think it appropriate to play all the testimony when the jury had not asked for it. Secondly, the question as to which lawyers had advised Petitioner was immaterial because Petitioner had bound himself by his actions.

CONCLUSIONS OF LAW

It is within the discretion of the trial judge to permit a jury at their instigation to rehear requested parts of the evidence after they have retired and begun deliberations. Green v. State, 43 Ga. 368, 373 (1871); Allen v. State, 187 Ga. 178, 183 (1938); Byrd v. State, 237 Ga. 781, 782(2)(1976). Further, the jury should be permitted to limit what they rehear to what they want to rehear, absent special circumstances that might work an injustice. Byrd v. State, supra.

The Court has reviewed the entire testimony of the witness and found nothing inconsistent with that portion played for the jury. There do not appear to be special circumstances which would have required the entire testimony or a more extensive excerpt be replayed. Petitioner has not shown the trial court abused its discretion.

Accordingly, the allegation in paragraphs 49-50 is found to be without merit.

51-54

The Supreme Court has already concluded that the weapons found in Petitioner's car were admissible as evidence "...to show how heavily armed the appellant was and to illustrate his state of mind." Wallace v. State, supra at 261(6).

55-63

The issues raised in paragraphs 55-63 have already been decided adversely to Petitioner. Wallace v. State, supra at 261(7) and (8).

64-75

In paragraphs 64-75, Petitioner challenges the constitutionality of the composition of the grand jury which indicted him and the traverse jury which convicted him. Specifically, Petitioner alleges the systematic exclusion of two groups: individuals not formally educated and individuals with "suspect reputations."

Pretermitting the issue of waiver, Petitioner has not demonstrated that the two groups are recognizable, distinct classes nor proved any degree of underrepresentation. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

Accordingly, these allegations are found to be without merit.

76-81

The Supreme Court has already concluded that the trial court did not impermissibly limit counsel's voir dire examination of prospective jurors at Petitioner's competency trial. Wallace v. State, supra at 259(2).

82-84

The Supreme Court has already affirmed the trial court's refusal to allow defense counsel to question prospective jurors about racial prejudice on voir dire for Petitioner's trial on guilt or innocence. Wallace v. State, supra at 261(5).

85-87

The Supreme Court has already concluded that the exclusion of defense witness Jenkins' personal opinion as to whether a death sentence should be imposed did not

prevent the jury from considering all mitigating circumstances. Wallace v. State, supra at 263(10).

88-93

Petitioner's argument that a Witherspoon qualified jury deprived him of a jury chosen from a representative cross-section of the community was rejected on direct appeal, Wallace v. State, supra at 263(11), and in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981).

94-95

In paragraphs 94-95, Petitioner claims that the prosecutor's closing argument in the sentencing phase of trial violated his consitutional rights. Specifically, Petitioner objects to the portion in which the prosecutor argued that the death penalty was a deterrent and there was a general need for the welfare of society for the imposition of the death penalty.

FINDINGS OF FACT

The Court has reviewed the closing argument of the prosecutor in the sentencing phase of trial. (T. 520-546).

CONCLUSIONS OF LAW

A prosecutor may argue for a death sentence and offer plausible reasons for his position. Allen v. State, 187 Ga. 178, 182 (1938); Strickland v. State, 209 Ga. 675(2) (1953); Chenault v. State, 234 Ga. 216, 224 (1975).

The Court finds that the prosecutor did not exceed the bounds of permissible argument.

Accordingly, this claim for relief is found to be without merit.

96-98

Petitioner's "prosecution-prone" argument was rejected on direct appeal, Wallace v. State, supra at 263(11), and in Smith v. Balkcom, supra.

99-103

Petitioner's allegation that his death sentence is being arbitrarily imposed is found to be without merit.

104-106

Petitioner's allegation that his death sentence is being discriminatorily imposed is found to be without merit.

107-112

Petitioner's argument that there is no theoretical justification for the death penalty is found to be without merit.

113-115

In paragraphs 113-115, Petitioner claims that his statements to police were involuntarily made so that their introduction violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Among the pretrial motions filed by defense counsel was a motion to suppress Petitioner's statements (R. 56-67). A hearing on the motion was begun but not completed due to counsel's request that the matter be held until after the adjudication of Petitioner's competency. (M.T., Sept. 10, 10-34).

At trial, arresting officers Philpott and Freeman described the circumstances of Petitioner's arrest without any objections from defense counsel. (T. 266; 282). Officer Philpott related the incriminating statements Petitioner made to her after being advised of his rights. (T. 272-276). Defense counsel offered Petitioner's written statement through the cross-examination of G.B.I. Agent Haizlip. (T. 329-339).

CONCLUSIONS OF LAW

Objections to confessions may be waived through nonobjection at trial. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Reeves v. State, 241 Ga. 44(1)(1978).

Because defense counsel failed to object to the admission of Petitioner's statements to arresting officers and offered Petitioner's written statement, the Court concludes that Petitioner has waived his right to challenge their admissibility.

Petitioner seeks to avoid the issue of waiver by claiming that trial counsel were ineffective for failing to raise the issue of admissibility. Petitioner alleges that the circumstances surrounding his arrest were coercive so as to render his statements involuntary and, therefore, inadmissible.

The Court has reviewed the circumstances of Petitioner's arrest and found nothing improper. Petitioner has made no showing that his statements were the result of coercion or inducement. Absent a showing, the Court cannot hold counsel were ineffective for this reason.

Rather than finding counsel ineffective, from the record it would appear that counsel abandoned the motion

to suppress, a tactical decision well within the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Accordingly, the Court finds this claim for relief to be without merit.

116

The Supreme Court has already decided this issue adversely to Petitioner. Wallace v. State, supra at 262(8).

117

Petitioner's claim that the verdicts from his competency trial and from the guilt/innocence and sentencing phases of his trial in chief are void is found to be without merit.

118-120

Petitioner's arguments as to the process of appellate review in Georgia were rejected in Smith v. Balkcom, supra.

WHEREFORE, all allegations in the amended Petition having been found to be without merit, the Petition, as amended, is hereby denied.

SO ORDERED, this 5 day of August, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

Application No. 2218

SUPREME COURT OF GEORGIA

ATLANTA, November 22, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROBERT LEWIS WALLACE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby DENIED.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I served copies of the annexed petition for writ of certiorari on respondent by depositing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Nicholas Dumich
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

All parties required to be served have been served. Done this 17th day of February, 1983.

Risa Lynn Lieberwitz
American Civil Liberties Union
of Georgia
88 Walton Street, N.W.
Atlanta, Georgia 30303

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NO. 82-6262

Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT LEWIS WALLACE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether or not the trial court's instructions operated to shift the burden of proof or to relieve the state from proving an essential element of the crime of murder?

2.

Whether or not Petitioner received effective assistance of counsel?

3.

Whether or not Petitioner was deprived of due process during his presentence hearing, as a result of the trial court's refusal to permit a defense witness from testifying as to her opinion about the ultimate sentence which should have been imposed on the Petitioner?

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NO. 82-6262

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT LEWIS WALLACE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

The Petitioner, Robert Lewis Wallace, was indicted by the July Term, 1979 Greene County, Georgia grand jury on charges of murder, aggravated assault, motor vehicle theft, and driving under the influence of alcohol. (R. 28-30).[1] He received the death penalty for murder, a twenty year consecutive sentence for aggravated assault, a seven year sentence for motor vehicle theft and a one year consecutive sentence for driving under the influence of alcohol. (R. 136-140).

[1] References to the record of Petitioner's case in the Superior Court of Greene County shall be referred to in this brief as (R.). References to the pagination of the transcript of Petitioner's trial shall be referred to as (T.). References to the transcript of Petitioner's state habeas corpus evidentiary hearing in the Superior Court of Butts County, Georgia, shall be referred to in this brief as (HT.).

Petitioner's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal, and thereafter his petition for a writ of certiorari and petition for rehearing were denied by this Court. Wallace v. State, 248 Ga. 255, 282 S.E.2d 323 (1981), cert denied, Wallace v. Georgia, ___ U.S. ___, 102 S.Ct. 1291 (1982), rehrng. denied., ___ U.S. ___, 102 S.Ct. 1743 (1982).

Following the granting of Petitioner's motion for a change of venue, the trial was held in the Superior Court of Baldwin County, Georgia, on February 11-15, 1980, and Petitioner was found guilty on all charges, after being found competent to stand trial. (R. 28). Petitioner's execution date was rescheduled for April 21, 1982, and on April 15, 1982, he filed a habeas corpus petition in the Superior Court of Butts County, Georgia. A hearing was held on the state habeas petition on May 13, 1982. That court denied relief in an order dated August 5, 1982, and on November 22, 1982, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal. Thereafter, Wallace filed this second petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

The evidence adduced at Petitioner's trial demonstrated that during the early morning hours of May 16, 1979, he was transported to the Union Point, Georgia Police Station in Greene County, Georgia on suspicion of driving under the influence of alcohol. Upon his arrival at the police station, and after being informed that it would be necessary to incarcerate him, Petitioner seized an opportunity to gain possession of a pistol from one of the arresting officers, and thereafter shot Officer Thomas Rowry and Officer Michael Cook. Officer Rowry eventually died as a result of the shooting, but Officer Cook survived and eventually testified at Petitioner's

trial. Petitioner fled the scene in a stolen police car, and was eventually arrested in Atlanta, Georgia on May 17, 1979, while an Atlanta police officer was investigating a burglary.

Officers Cook and Rowry had stopped Petitioner on a Georgia highway shortly after 12:00 a.m. on May 16, 1979, when they had observed his automobile driving off the side of the roadway on several occasions, and swerving into the opposite lane of traffic. (T. 227, 336). When Petitioner failed a field test for alcohol, the officers transported him to the police station. (Id.) At the police station the officers then administered Petitioner an intoximeter test which he also failed. (T. 228-229). At that point Petitioner was placed under arrest, and was informed that it would be necessary to detain him in jail for at least four hours. (T. 229-330).

As Officer Cook began to lead the Petitioner to a jail cell, Petitioner suddenly attacked him. While wrestling for possession of Officer Cook's pistol, Petitioner pulled the trigger and shot Officer Cook in his lower abdomen. (T. 229, 231). Officer Rowry, who had temporarily left the room after completing the intoximeter testing procedure, returned to find Officer Cook wounded and the Petitioner facing him with a pistol. (T. 232). As Rowry bolted for the outside door Petitioner shot him. Officer Cook related that was the last time he saw Officer Rowry alive. Petitioner then turned, walked back to where Officer Cook was lying on the floor, and pointed the pistol approximately 6 to 8 inches from his head. As Officer cook turned his head in an attempt to avoid a fatal shot, Petitioner fired, but the bullet missed. The pistol was close enough to Officer Cook's head to cause powder burns on his chin and neck. (T. 233).

After this second shot was fired, Petitioner fled from police headquarters. (T. 237-238). Seeing blood stains on the floor, Officer Cook surmised that Officer Rowry had been wounded. (T. 238). Officer Rowry's dead body was eventually

found approximately one block from the police station. (T. 262-264). He had been shot in the throat. (T. 263).

Following the shooting, Petitioner stole one of the parked police cars and drove to a densely wooded area. (T. 339-340). After hearing that Officer Rowry had died, Petitioner convinced his brother to drive him to Atlanta, and he was eventually captured by an Atlanta city police officer who was investigating a burglary. At the time of Petitioner's capture, the Atlanta police officer had shined his flashlight into a basement area, and observed the Petitioner who appeared to be reaching into another room for a loaded shotgun. (T. 340, 268-269, 279-280, 283). Also found in the room with the Petitioner was a .22 caliber handgun. (T. 270). Upon questioning, Petitioner admitted that he was Robert Lewis Wallace, and he was thereafter taken into custody. (T. 272-274, 284, 288).

Petitioner admitted shooting the police officer and taking the vehicle. He was in possession of keys to the stolen police vehicle, and after his arrest directed officers to the location of the police car which he had hidden. (T. 228, 267, 372). As previously noted, Petitioner received the death penalty for the murder of Officer Rowry. The death penalty was supported by two aggravating circumtances, those being: (1) that the offense of murder was committed against a peace officer while he was engaged in the performance of his official duties [O.C.G.A. § 17-10-30(b)(8); Ga. Code Ann. § 27-2534.1(b)(8)], and (2) the murder was committed by a person in the lawful custody of a police officer. [O.C.G.A. § 17-40-30(b)(9); Ga. Code Ann. § 27-2534.1(b)(9)]. (T. 568).

Additional facts will be referred to in the following portion of this brief which may be necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. NEITHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY NOR ITS EVIDENTIARY RULINGS OPERATED TO SHIFT THE BURDEN OF PROOF TO THE PETITIONER, OR TO RELIEVE THE STATE OF PROVING THE ESSENTIAL ELEMENT OF MALICE WHICH WAS REQUIRED TO SUPPORT PETITIONER'S CONVICTION.

Under Petitioner's first argument he asserts that the trial court's instructions to the jury, as reflected on pages 452 and 458-459 of the trial transcript, operated to shift the burden of proof to the Petitioner on the issue of malice, thus relieving the State from having to prove all of the essential elements of the crime of murder. Additionally, he contends in his argument that this error was magnified by the trial court's allegedly erroneous ruling which prevented Petitioner from introducing testimony relevant to the issue of his intent.

On direct appeal to the Georgia Supreme Court, Appellant also raised the aforesaid issues. Under O.C.G.A. § 16-5-1; Ga. Code Ann. § 26-1101, malice is defined as follows:

> Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

The trial court instructed the jury in accordance with this code section. (T. 452). Upon reviewing that portion of the trial court's instruction relating to the aforesaid definition

on implied malice, the Georgia Supreme Court, on direct appeal of Petitioner's conviction, concluded that the instruction clearly did not operate in a burden shifting manner or to create an impermissible inference. Wallace v. State, 248 Ga. 255, 262, 282 S.E.2d 323 (1981), citing, Frankin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980); Burney v. State, 244 Ga. 33, 257 S.E.2d 543 (1979). This ruling by the Georgia Supreme Court was correct. The aforesaid instruction simply indicates to the jury that malice shall be implied where all of the circumstances actually demonstrate that malice exists. Recently the Eleventh Circuit Court of Appeals noted that the aforesaid instruction tells the jury that a finding of malice may be based entirely on circumstantial evidence. Hance v. Zant, 696 F.2d 940, 953 (11th Cir. 1983). In reviewing the exact same instruction, the Eleventh Circuit stated:

> It does not relieve the prosecution from its burden of proving malice beyond a reasonable doubt. In light of the court's explicit prior directions about circumstantial evidence, we find no error in the court's instruction on malice.

As in Hance, the trial court in Petitioner's case also gave extensive instructions on circumstantial evidence, stating as follows:

> Circumstantial evidence is that which only tends to establish the issue of proof of various facts sustaining by their consistency, the hypothesis, or the supposition claimed. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis or supposition of guilt, but shall exclude every other reasonable

hypothesis, save that of the guilt of the accused. When the guilt of the Defendant depends on circumstantial evidence, the rule is that each separate fact or issue linked in the chain of circumstances from which the deduction of guilt is sought to be drawn, must be clearly proven beyond a reasonable doubt. A fact or circumstance not so clearly proven shall not be considered by the Jury as part of the chain of circumstances but should be rejected by them. The circumstances so proven must be a part of a complete unbroken chain, and must not only be consistent with the Defendant's guilt but must exclude every other reasonable hypothesis or supposition save that of the guilt of the accused. If any one or more of the circumstances relied on by the State are not so clearly proven and for that reason you reject one or more of these circumstances relied upon, then you would inquire whether the remaining circumstances you believe are so clearly proven are consistent with the Defendant's guilt and inconsistent with any other reasonably hypothesis or supposition save that of his guilt. (T. 448-449).

The jury was also instructed that malice is an essential ingredient of the offense of murder, and that it is the unlawful intention to kill a human being without excuse, justification or mitigation. The jury was instructed that a person will not be presumed to act with criminal intention, but such intention could be found upon consideration of the words, conduct, demeanor, motive and all other circumstances connected

with the act for which the accused is prosecuted. (T. 458). The jury was also instructed that a specific intent to commit the crime charged in the indictment and each count thereof is an essential element that the state must prove beyond a reasonable doubt. (T. 458, 459). In light of the aforesaid, Respondent submits that it is unnecessary for this Court to grant the writ to review Petitioner's challenge to the trial court's instruction on implied malice, which was given pursuant to O.C.G.A. § 16-5-1; Ga. Code Ann. § 26-1101.

Petitioner has also challenged the additional instructions which were given by the trial court which related to criminal intention, and which were as follows:

> I charge you that a person will not be presumed to act with criminal intention but the trier of facts . . ., may find such intention upon consideration of words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. A specific intent to commit the crime . . . is an essential element that the State must prove beyond a reasonable doubt. Intent may be shown in many ways provided the jury finds that it existed from the evidence produced before them. It may be inferred from the proven circumstances or by the acts and conduct, or <u>it may be presumed when it is the natural and necessary consequence of the act</u>." (T. 458-459).

Petitioner asserts that the underlined, aforesaid instruction operated in an unconstitutional, burden shifting manner in contravention of this Court's ruling in <u>Sandstrom v. Montana</u>, 442 U.S. 510 (1979). This issue was also addressed specifically by the Georgia Supreme Court which concluded that,

after reading the instructions in their entirety, the aforesaid presumption did not operate as a conclusive presumption, but merely "allows but does not require . . . the trier of fact to infer the [element of the crime] from proof by the prosecution of the basic [fact] and that places no burden of any kind on the defendant." Wallace v. State, supra, 248 Ga. at 263.

Of course, in analyzing a jury instruction it is axiomatic that the trial court's charge must be considered as a whole. Cupp v. Naughten, 414 U.S. 141, 147 (1973). Careful attention must be afforded to the words actually spoken to the jury, County Court of Ulster County v. Allen, 442 U.S. 140 (1979), and "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror would have interpreted the instruction." Sandstrom v. Montana, supra, 442 U.S. at 510.

It is clear that in a criminal case it is encumbent upon the State to prove every element of the alleged offense beyond a reasonable doubt, and the State may not shift the burden of proof to the defendant on an essential element of the crime by presuming that ingredient upon the showing of other elements of the offense. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). Nevertheless, permissive inferences or presumptions which allow, but which do not require, the trier of fact to infer an elemental fact from proof by the State of a basic fact, place no burden upon the accused, and are not unconstituional unless, under the facts of the case, there is no rational way a trier of fact could have made the connection as permitted by the inference. Ulster County, supra, 442 U.S. at 157. Ultimately, the test of a presumption's constitutional validity in any given case depends upon whether the evidentiary device undermines the fact finder's responsibility at trial to find the ultimate facts beyond a reasonable doubt. Id., citing In Re Winship, 397 U.S. 358, 364 (1970) and Mullaney v. Wilbur, supra at 702-703, n. 31.

A charge identical to that which has been previously cited, and which is listed on pages 458-459 of the trial transcript, was also considered in Hance v. Zant, supra, and was found not to constitute a burden shifting charge. In Hance, the Eleventh Circuit noted that immediately preceeding the challenged portion of the charge in question, the trial court had instructed the jury that the accused was presumed to be innocent until proven guilty; that a person will not be presumed to act with criminal intention; that the state must prove the existence of criminal intent beyond a reasonable doubt; that intent must be found from the evidence produced at trial; and that circumstantial evidence alone would not justify a finding of guilt unless the circumstances are entirely consistent with the defendant's guilt, are wholly inconsistent with any reasonable theory of the defendant's innocence and are so convincing as to exclude a reasonable doubt of the defendant's guilt. The court noted that these prior instructions made it unlikely that the jury could have interpreted the challenged instruction on intent to be an impermissible burden shifting or conclusive presumption. Id. at 953. The jury in Petitioner's case was instructed similarly to the jury in Hance. Additionally, as in Hance, the court charged only that intent may be presumed when it is the natural and necessary consequence of the act. "A reasonable jury could only interpret this language as permitting the inference described--they were allowed to draw the inference, but they were not obligated to do so." Hance v. Zant, 696 F.2d at 953.

Finally, evidence objectively demonstrating Petitioner's criminal intent was overwhelming, and under such circumstances, even if the challenged instruction was burden shifting, any error would have been harmless beyond reasonable doubt. Mason v. Balkcom, 669 F.2d 222, 226-227 (5th Cir. 1982); Johnson v. Balkcom, 695 F.2d 1320, 1323 (11th Cir. 1983).

It is also clear that the trial court properly excluded Petitioner's proffered testimony from psychiatrist Dr. Hirani,

pertaining to Petitioner's degree of criminal responsibilty at the time of the crime. Defense counsel, in addressing the court during argument, stated that the defense was not contending that Petitioner was insane, or that he could not distinguish between right and wrong at the time of the commission of the crime. (T. 392-393, 394). Under Georgia law, mere weakness of mind or a mental abnormality which does not deprive a defendant of the ability to distinguish between right and wrong so as to fall under O.C.G.A. § 16-3-2; Ga. Code Ann. § 26-702, is not sufficient as a defense. Reece v. State, 212 Ga. 609(3) (1956); Berryhill v. State, 235 Ga. 549, 553 (1975), cert. denied, 429 U.S. 54 (1977). Although Petitioner contends that the excluded testiomy could have been relevant to the jury's consideration of the facts of this case pertaining to the issue of specific intent or malice; nevertheless, since the Petitioner was not contending that his alleged mental illness had deprived him of the ability to distinguish between right and wrong, the testimony of Dr. Hirani was immaterial and irrelevant. Wallace v. State, supra, 248 Ga. at 262.

For all the aforesaid reasons, Respondent respectfully submits that this Court should refuse to grant the writ to review Petitioner's first argument.

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Under Petitioner's second argument, he asserts that he received ineffective assistance of counsel during the sentencing phase of his trial, because of trial counsel's failure to present psychiatric testimony and testimony pertaining to Petitioner's allegedly deprived childhood and difficult family background. Petitioner also claims that trial counsel was ineffective for failing to present evidence pertaining to Petitioner's lack of a criminal record, and as a result of counsel's failure to present testimony from the deceased victim's father to the effect that he did not want Petitioner to be sentenced to death.

Here Petitioner was represented by three attorneys at trial. A defense organization retained attorney Edward Augustine for the sum of $10,000 plus expenses. (HT. 13-14, 78). Attorney Augustine was also assisted by attorneys Katrina Breeding and August Siemon, who provided services on a pro bono basis. (HT. 78; T. 40). Of course, a criminal defendant is constitutionally entitled to competent counsel, whether counsel was appointed or retained. Cuyler v. Sullivan, 446 U.S. 335, 344-345 (1980). The standard for effective assistance of counsel under the Sixth Amendment to the United States Constitution requires that a criminal defendant be provided representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982); Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980).

The constitutional standard does not require errorless counsel, nor counsel judged ineffective by hindsight. Winfrey v. Maggio, 664 F.2d 550, 552 (5th Cir. 1981); United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial proceedings and the entire record must be considered in examining the performance of counsel. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Lee v. Hopper, 499 F.2d 456 (1974). "It is within this framework of the totality of the circumstances, that we judge the 'fundamental fairness' of the trial and ultimately counsel's ineffectiveness." Nelson v. Estelle, supra, at 906.

A habeas corpus petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence, and he must also show prejudice which worked to his actual and substantial disadvantage. Washington v. Strickland, 693 F.2d 1243, 1258, 1262 (5th Cir. 1982).

As noted previously, the record in the trial court and the state habeas court established that Mr. Edward Augustine was lead counsel for the Petitioner and was assisted by August Siemon and Katrina Breeding. Additionally, Mr. Augustine was assisted in his investigation of the case by Reverend G. Lee Avery. (HT.13, 78). It appears that Reverend Avery and Ms. Breeding were utilized as investigators, and they contacted numerous potential witnesses during the months preceding Petitioner's trial. In addition to interviewing witnesses about the facts of the case, potential character witnesses were interviewed as well as individuals who could provide information pertaining to jury selection. (HT. 15, 30, 135). All the results of the investigative efforts were related to attorney Augustine. (HT. 17, 27, 30-31).

The trial transcript shows that at the presentence hearing, the defense called Reverend Avery, Doreatha Jenkins (referred to in the trial transcript as Aretha Jenkins), and Mr. Roger Wallace. Mr. Roger Wallace is the Petitioner's father, and he testified pertaining to the background of the Petitioner. He related how Petitioner often sniffed gasoline as a youngster, and sometimes would do so two or three times per day. (T. 480). Mr. Wallace testified that this activity extended for a period of two to three years. (T. 481). He also identified the photographs of Petitioner's ramshackle house where he was living at the time of the incident. (T. 482-484). Mr. Wallace also testified that Petitioner's mind tended to wander, and he further testified how Petitioner would get upset when things did not proceed as he wanted them to. (T. 45-46). He also related that his son only had a fifth or sixth grade education. (T. 486).

Ms. Jenkins testified that she had known Robert for most of his life and had been his first teacher. (T. 494). She testified how Robert used to work for her, doing things like cutting the grass, yard work, and painting her porch. She testified how he would appear "kind of wavy" at times and how

he would "stare a lot." (T. 496). She also gave specific examples of how the Petitioner appeared to engage in unusually repetitive actions while working for her, such as replowing the same ground in her garden. (T. 496-497, 500). She also related to the jury that she thought the Petitioner was a very nice person, was easy to get along with, how he used to play with other children quite well, and how he did a beautiful job as far as she was concerned. (T. 497-498, 501).

Reverend Avery also testified about his knowledge pertaining to the Petitioner's background. He indicated that he had known the Wallace family all of his life, and testified in detail pertaining to his contacts with the Petitioner following Petitioner's arrest. Reverend Avery described his extreme difficulty in communicating with the Petitioner, and related that he was unable to even carry on a normal conversation from beginning to end. (T. 506-508). Reverend Avery related that Petitioner told him that on one occasion he saw apparitions, and as an example related to the jury that Petitioner told him that he had observed six bears while they were talking. (T. 508). Avery related that Petitioner would always look in other directions, shuffled his feet, and appeared nervous while Petitioner was talking. He also would allegedly refused to speak about the case, and complained of numerous physical ailments, including cold spots on his body and a swollen head; however, Reverend Avery did not observe these ailments.

Reverend Avery also attempted to communicate with the Petitioner about spirtual matters, and he testified that at one point Petitioner told him that he wanted to accept the Lord. (T. 511). Avery also related that when he talked to the Petitioner on the morning before Mr. Avery's testimony, he observed that Petitioner laughed at inappropriate times, such as when he attempted to talk about the trial. (T. 512-513). Avery also testified that he had visited the Petitioner's home, and described it as a "delapidated shack." (T. 514).

Thus, as the evidence in the trial transcript shows, the defense was able to provide the jury with allegedly mitigating testimony pertaining to Petitioner's background and mental problems. The fact that witness Doreatha Jenkins, now after Petitioner's trial has ended, has decided she could have related additional information pertaining to Petitioner's weird behavior and difficult childhood, does not reflect that trial counsel was ineffective. Moreover, Ms. Jenkins' testimony pertaining to Petitioner's mother having a drinking problem and having left home when he was very young (age 8) is simply not, in any way, mitigating to the crime in this case.

Petitioner also claims that counsel was ineffective in failing to secure testimony from the father of the murder victim, Thomas Rowry, to the effect that Mr. Rowry did not want the Petitioner to be sentenced to death. This testimony was irrelevant and immaterial, and clearly would have been inadmissible at trial. Wallace v. State, supra, 248 Ga. at 263. (See the following argument in this brief addressing this same issue pertaining to witness Jenkins). Petitioner's attorney did attempt to introduce similar testimony from witness Doreatha Jenkins, by asking her whether she thought the Petitioner should be sentenced to death. The trial court sustained the objection (T. 503-503), and the trial court's ruling was affirmed on direct appeal by the Georgia Supreme Court. Id.

Although Petitioner's trial counsel did not call psychiatric witnesses during the sentencing phase of Petitioner's trial, a review of the state habeas transcript shows that this decision amounted to a trial tactic, and as such, should not support the basis for a finding of ineffective assistance. Ordinarily tactical decisions by trial counsel do not rise to a level of ineffective assistance, even if, in retrospect, it appears that counsel's choice was ill-advised. Stanley v. Zant, ___ F.2d ___, No. 81-7615, slip op. 1476 (11th Cir. February 11, 1983); Ford v. Strickland, 696 F.2d 804, 820

(11th Cir. 1983); Profitt v. Wainwright, 685 F.2d 1222, 1250 (11th Cir. 1982).

Although psychiatrists certainly may have been able to testify to Petitioner's schizophrenic or paranoid psychosis which was exhibited prior to trial, none of the psychiatrists could have testified that the Petitioner was insane at the time of the murder. In fact, a review of the psychiatric testimony during Petitioner's competency trial reveals that Petitioner was effectively able to communicate on numerous subjects with Drs. Hirani and Jacobs during their early interviews with him, and they had initially concluded that he was competent to stand trial. (CT. 129, 282-284, 324-325).[2] It was not until February of 1980 and after a short one and one-half hour evaluation of the Petitioner that Dr. Hirani and Dr. Jacobs concluded that Petitioner was not competent to stand trial, i.e., that he did not have sufficient ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. (CT. 324-325). The record does show that Dr. Baccus had examined the Petitioner in August of 1979, and concluded at that time that he exhibited schizophrenic, paranoid-type behavior (CT. 343-348), and that he was mentally incompetent to stand trial. (CT. 348, 354).

However, if these psychiatrists would have testified during the sentencing phase, it is also clear from examining their testimony at the competency hearing, that the district attorney would have been able to elicit testimony that the July, 1979 psychiatric report revealed that at that time Petitioner was able to communicate about the crime, denied hallucinations, and denied any suicide attempts. (CT. 282-284). Dr. Hirani learned that one of the reasons why the Petitioner became incommunicative about the case, was because his attorneys had advised him not to talk about it. (CT. 297). Additionally, Dr.

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[2]References to the pagination of Petitioner's competency trial shall be referred to as (CT.).

Hirani testified that pscyhological testing was not done because Petitioner would not cooperate, even though he appeared to understand what the testers wanted him to do. (CT. 301). Hirani's understanding of Petitioner's lack of cooperation relating to the psychological testing was that it was also a result of Petitioner's discussions with his attorneys. (CT. 301-302). This testimony obviously would have tended to help convince the jury that Petitioner was manipulative and attempting to be deceptive to avoid responsibility for his acts.

Dr. Jacobs also testified that it was not until his February interview with the Petitioner that he determined that the Petitioner was incompetent to stand trial; however Jacobs admitted that prior to the February interview, it was explained to the Petitioner that if he was able to stand trial, and if found competent, he could be tried for murder. (CT. 330-331).

Although Dr. Baccus testified that he suspected the Petitioner had enough intelligence to deceive people, he also stated that he did not feel that the Petitioner was doing so in this case. (CT. 359, 365). On cross-examination, it was revealed, that in making his diagnosis of the Petitioner, Dr. Baccus did give great weight to an investigate report which was prepared by defense counsel, and which comprised approximately fifty percent of the historical background of the Petitioner. The other fifty percent of Petitioner's historical background came from Baccus' own discussions with the Petitioner. (T. 377-382).

In conclusion, Respondent admits that although the psychiatric testimony may have been able to show some schizophrenic, paranoid type behavior on the part of the Petitioner, this testimony would have been subjected to extensive cross-examination by the district attorney, which may have revealed that the Petitioner was manipulative and deceptive. Moreover, this paranoic or schizophrenic behavior was not necessarily so mitigating that defense counsel should be considered ineffective for failing to call the psychiatrists

at trial, when he did, in fact, call other witnesses who testified as to the Petitioner's strange behavior.

Defense counsel was questioned at the state habeas hearing pertaining to his failure to call psychiatric experts, and he revealed that the decision not to call them had been intentionally made. He felt that the jury was already aware that the Petitioner had a psychiatric problem and that it was not really necessary to put up the expert testimony. (HT. 91-92). He did state, however, that in retrospect he regreted his decision. (HT. 92). Of course, since Petitioner ultimately received the death penalty, this type testimony is understandable, but such self-criticism should not automatically be equated with a constitutional violation.

Petitioner also asserts that his trial attorney was ineffective in failing to introduce into evidence, Petitioner's lack of a prior criminal record. Of course, since there was absolutely no evidence introduced by the State of any prior convictions of Mr. Wallace, and since the State did not refer to any prior criminal convictions during its argument, the jury certainly could not have assumed that Mr. Wallace did have any prior convictions. In fact, in the absence of any evidence by the State pertaining to prior convictions, it was incumbent upon the jury to conclude that Wallace had no prior convictions. Thus, there was no merit to Petitioner's assertions that counsel was ineffective in this area.

In conclusion, a review of Petitioner's allegations pertaining to ineffective assistance shows that he is merely criticizing tactical decisions made by counsel during the heat of trial, or is quarreling with the amount of evidence presented. The Constitution does not require perfect counsel, and the appellate courts should not sit to second guess considered professional judgment with the benefit of 20/20 hindsight. Washington v. Watkins, 655, F.2d 1346, 1355 (5th Cir. 1981); Ford v. Strickland, supra, 696 F.2d at 820. Thus, Respondent submits that this Court should reject Petitioner's second argument.

III. DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL, THE TRIAL JUDGE PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO A WITNESS TESTIFYING AS TO WHETHER OR NOT SHE THOUGHT THAT THE PETITIONER SHOULD BE SENTENCED TO DEATH.

During the redirect examination of defense witness Jenkins, defense counsel inquired as to whether she thought that the Petitioner should be sentenced to death. The trial court sustained the State's objection to this question. (T. 503-504). Petitioner argues that the limitation of this testimony violated the rulings of this Court in Chambers v. Mississippi, 410 U.S. 284 (1973); Lockett v. Ohio, 438 U.S. 586 (1978); and Green v. Georgia, 442 U.S. 95 (1979).

Of course, recently in Green v. Georgia, supra, this Court held that a state may not mechanistically apply its rules of evidence during the sentencing phase of a death penalty case so as to defeat the ends of justice. Id. 442 U.S. at 97, citing Chambers v. Mississippi, supra. In Green the trial court had applied Georgia's hearsay rule during the sentencing phase of Green's trial to exclude testimony from a witness who allegedly overheard Green's co-defendant admit that he was the person who had actually shot and killed the victim in that case. The testimony was permitted at the trial of the co-defendant because it was an inculpatory admission. It was technically inadmissible under Georgia law at Green's trial, because it was hearsay. Under the unique circumstances of Green's case, this Court vacated Green's sentence, finding the ends of justice were not served by applying Georgia's evidentiary law to exclude the testimony during the sentencing phase of Green's trial. Green v. Georgia, supra, 442 U.S. at 97.

In Lockett v. Ohio, supra, this Court examined an Ohio statute which severely limited the circumstances which could be

considered as mitigating against the death penalty. The limited range of these mitigating circumstances was found to be in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The Court concluded that in all except the rarest kind of capital case, the sentencer should " . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. 438 U.S. at 604. This statement was qualified, however, by a footnote wherein the Court also stated, "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumsances of the offence." Id. 438 U.S. at 604, n. 12.

In Petitioner's case, defense counsel was attempting to elicit from the witness, a personal opinion which in fact, was the ultimate issue to be decided by the jury. It did not pertain to any mitigating circumstance, and this opinion by the witness was immaterial. Moreover, as noted by the Georgia Supreme Court, this witness who was Appellant's first teacher, was permitted to testify pertaining to numerous facts and circumstances relating to the Appellant's life which were allegedly mitigating.

In conclusion, since witness Jenkins was permitted to testify pertaining to numerous facts about the Appellant's life, and since the excluded testimony dealt only with the ultimate issue which was to be decided by the jury, the Georgia Supreme Court correctly affirmed the ruling of the trial court excluding her opinion about the sentence which Petitioner should have received. Thus, Respondent submits that this Court should not grant the writ in order to review Petitioner's third and final argument.

CONCLUSION

For all of the aforesaid reasons Respondent respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, NICHOLAS G. DUMICH, attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served counsel for the Petitioner with a true and correct copy of the attached Brief for the Respondent in opposition, by depositing same in the United States Mail with adequate postage affixed thereon to assure proper delivery and properly addressed to:

Ms. Risa L. Lieberwitz
Ms. Elyse Aussenberg
Attorneys at Law
American Civil Liberties Union of Georgia
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This 11th day of March, 1983.

NICHOLAS G. DUMICH
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